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No. 86-1162

In the Supreme Court of the United States

OCTOBER TERM, 1986

CECIL REX MCCALLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's arrest was supported by probable cause.

2. Whether the district court erroneously admitted hearsay evidence at petitioner's suppression hearing.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Commonwealth v. *Barnett*, 484 Pa. 211, 398 A.2d 1019 (1979)	6
Commonwealth v. *Thibeau*, 429 N.E.2d 1009 (Mass. 1981)	6
Florida v. *Rodriguez*, 469 U.S. 1 (1984)	7
Florida v. *Royer*, 460 U.S. 491 (1983)	7
People v. *Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985), cert. dismissed, No. 85-1265 (July 7, 1986)	5, 6
People v. *Tebedo*, 81 Mich. App. 535, 265 N.W.2d 406 (1978)	6
People v. *Thomas*, 660 P.2d 1272 (Colo. 1983)	6
Peters v. *New York*, 392 U.S. 40 (1968)	7
State v. *Truss*, 317 So. 2d 177 (La. 1975)	6
United States v. *Matlock*, 415 U.S. 164 (1974)	8
United States v. *Sharpe*, 470 U.S. 675 (1985)	6, 7

Statute and rule:

21 U.S.C. 841(a)(1)	1
Fed. R. Evid. 104(a)	8

Miscellaneous:

W. LaFave, *Search and Seizure* (1978 & Supp. 1986):	
Vol 1	6
Vol. 3	6

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 23A-23D) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1986. A petition for rehearing was denied on November 14, 1986. The petition for a writ of certiorari was filed on January 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a conditional plea of guilty in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment, all but three months of which was suspended, to be followed by a

three-year special parole term. The court of appeals affirmed (Pet. App. 23A-23D).

1. Before petitioner entered his guilty plea, he moved to suppress a quantity of cocaine found by the police near a parked pickup truck at Washington National Airport, as well as statements he made to law enforcement officers following his arrest. The evidence adduced at the suppression hearing showed that, at 10 p.m. on February 26, 1986, United States Park Police Detective John Cornille and Drug Enforcement Administration (DEA) Special Agent John Lee were at Washington National Airport observing passengers coming off a flight that originated in Miami, Florida, a known source city for drugs (C.A. App. 39). While doing so, they saw petitioner come off the plane, leave the gate area, look around the terminal in a nervous manner, walk past the baggage claim area, and leave the terminal (*id.* at 40). Although it was cold and snowing outdoors, petitioner was wearing only a pair of slacks, a shirt, and a pair of shoes (*id.* at 40-41). He carried no luggage (*ibid.*).

Detective Cornille and Agent Lee approached petitioner; Cornille showed his identification and stated that he was with the DEA Airport Detail (C.A. App. 40). Detective Cornille asked petitioner if he would answer some questions, and petitioner said that he would (*ibid.*). Cornille asked petitioner if he had just come off a flight. Petitioner replied that he had come to the airport to meet a friend, but that the friend had not shown up and that he was now leaving (*id.* at 43). Cornille told petitioner that he had seen him coming from the plane. Petitioner repeated that he was there to meet a friend. Detective Cornille then explained the purpose of the DEA Airport Detail and asked petitioner if he was carrying any narcotics. Petitioner's response was to turn and run (*id.* at 44). He sprinted across a patch of grass, leaped over a railing, and dropped approximately 14 feet to an access road passing underneath the terminal building (*ibid.*).

Detective Cornille and Agent Lee gave chase. Cornille shouted, "Stop, police," as petitioner continued to run away (C.A. App. 44). In the course of the pursuit, Lee observed petitioner pull up his shirt and put his hand near the crotch area of his clothing, a common hiding place for illegal drugs (*id.* at 45-47). Lee then saw petitioner slow or stop, bend downward, and straighten up next to a pickup truck parked on a public street (*id.* at 51). Petitioner began running again, but Lee soon hailed a taxi, caught up, and arrested him. A short time later, a package of cocaine was found under the pickup truck where petitioner had stooped momentarily during his flight (*ibid.*).

About ten minutes after the arrest, Detective Cornille went to the National Airport holding cell and sat down next to petitioner, who had been taken there by FAA police (C.A. App. 52-53). After reading petitioner the *Miranda* warnings, Cornille asked whether he understood the warnings and would be willing to answer some questions (*ibid.*). Petitioner responded affirmatively to both inquiries. He did not ask for an attorney. When asked what happened that evening, however, petitioner was generally unresponsive (*id.* at 54).

Detective Cornille left petitioner for about ten minutes before rejoining him in the processing room (C.A. App. 55). While Cornille was gone, Agent Lee joined petitioner and again read him the *Miranda* warnings. Petitioner said he understood his rights, but he did not respond when Lee asked if he would answer questions. Lee then briefly left the processing room. When he returned, petitioner initiated a conversation with Lee by asking what would happen to him (*id.* at 57-58). At about that point, Cornille returned to the room and observed petitioner make a statement to Lee. Petitioner said that the drugs were his and that this was "the second time I done it, I was to put it in the trash can and I could receive $500 for it" (*id.* at 55, 81-82).

2. Following the hearing, the district court found that the agents had probable cause to stop petitioner in light of his behavior, his unusual dress, and his actions in running away when he was asked about narcotics (Pet. App. 22F-22G). The district court also held that petitioner had abandoned the package of drugs (*id.* at 22F), and that petitioner had twice been advised of his *Miranda* rights, which he knowingly and voluntarily waived (*id.* at 22G-22H). Accordingly, the court denied the motion to suppress (*id.* at 22H). Thereafter, petitioner pleaded guilty, reserving his right to appeal from the denial of the suppression motion.

3. On appeal, petitioner raised four issues. First, he argued that the district court erred in allowing Detective Cornille to testify at the suppression hearing concerning certain out-of-court statements made by Agent Lee. The court of appeals rejected this contention, noting (Pet. App. 23B) that hearsay evidence is admissible at preliminary proceedings.

Next, petitioner claimed that the government agents "seized" him without reasonable suspicion when they approached him outside the airline terminal. The court of appeals held (Pet. App. 23C) that the agents had not restrained petitioner's liberty when they approached him and asked him if he would answer questions. Therefore, the court held, the agents had not conducted a *Terry* stop requiring reasonable suspicion. The court of appeals also disagreed with petitioner's third contention—that the agents lacked probable cause to arrest him (*id.* at 23C-23D). Finally, the court rejected petitioner's claim that his confession was involuntary, finding that the district court's determination to the contrary was amply supported by the record (*id.* at 23D).

ARGUMENT

1. Petitioner contends (Pet. 11-19) that his arrest was unsupported by probable cause. Although the petition

does not specify the relief that petitioner seeks for that alleged violation of his rights, we assume that petitioner contends that the bag of cocaine seized from under the pickup truck should have been suppressed.[1]

The court of appeals properly held that the following factors were "more than sufficient" (Pet. App. 23D) to constitute probable cause for an arrest: "[petitioner] behaved suspiciously when he deplaned, carried no luggage, wore light clothing even though it was snowing outside, lied when asked about his plane flight, and fled when asked about drugs" (*id.* at 23C-23D). As the court's brief, unpublished opinion suggests, it is beyond all reasonable dispute that these facts combined to constitute probable cause. Petitioner does not point to any decision that suggests otherwise. None of the state cases that he cites involved a defendant who left a plane coming from a "source city" carrying no luggage, behaved suspiciously on leaving the plane, was inappropriately dressed for his

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[1] As noted below, the court of appeals correctly held that the arrest in this case was supported by probable cause. Even if there had not been probable cause, however, we do not believe that suppression of the cocaine should follow, since the seizure of the cocaine was not incident to petitioner's arrest but rather resulted from his prearrest relinquishment of the cocaine. We agree with the district court (Pet. App. 22F) that the cocaine was abandoned property and that petitioner lacked standing to complain of its seizure regardless of the legality of the police conduct. See Brief for the United States as Amicus Curiae at 7 n.1, *Michigan* v. *Shabaz*, No. 85-1265. Even if the police conduct before petitioner abandoned the cocaine required some justification, moreover, petitioner had only been chased, not arrested, before the abandonment. Therefore only reasonable suspicion, not probable cause, should have been required. See generally *People* v. *Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985) (requiring reasonable suspicion, not probable cause, to justify police chase of suspect who abandoned contraband during the chase), cert. dismissed, No. 85-1265 (July 7, 1986). In light of the existence of probable cause, however, the court of appeals did not reach these issues, and there is no need for this Court to review the case in order to resolve these issues.

ostensible destination, lied to the police, or fled when asked about drugs; each decision simply holds that the circumstances of that case were not suspicious enough, even when combined with the defendant's flight, to justify the police action taken.[2]

Rather than point to any similar case decided the other way, petitioner claims that the court of appeals erred by attaching any weight at all to his flight. The basis for that claim is far from clear, since this Court and many others have time and again attached great significance to flight when it is coupled, as in this case, with other suspicious circumstances. See *United States* v. *Sharpe,* 470 U.S. 675, 682 & n.3 (1985); *id.* at 705-706 & n.2 (Brennan, J., dissenting) (collecting cases); 1 W. LaFave, *Search and Seizure* § 3.6(e), at 669 & n.95 (1978 & Supp. 1986) (collecting cases); 3 *id.* § 9.3 (c), at 74-75 & nn.96, 99 & 106 (collecting cases).[3] The flight in this case, prompted

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[2] *People* v. *Thomas,* 660 P.2d 1272 (Colo. 1983) (defendant ran to a nearby building when he saw police officers in patrol car); *State* v. *Truss,* 317 So. 2d 177 (La. 1975) (defendant looked startled and continued to walk along platform of bus station after seeing police); *Commonwealth* v. *Thibeau,* 429 N.E.2d 1009 (Mass. 1981) (defendant made sudden left turn on his bicycle and, *after* police began pursuit, fled); *People* v. *Shabaz, supra* (defendant fled on approach of unmarked police vehicle); *Commonwealth* v. *Barnett,* 484 Pa. 211, 398 A.2d 1019 (1979) (defendant ran when plainclothes officers got out of their car). Petitioner further cites *People* v. *Tebedo,* 81 Mich. App. 535, 265 N.W.2d 406 (1978) (per curiam), which was not decided by the highest court of a state and, unlike petitioner's case, involved "flight alone." Petitioner's citation (Pet. 17-18) to our brief in *Michigan* v. *Shabaz,* No. 85-1265, also does not help his case. Our brief in *Shabaz* emphasized the tremendous importance of flight in gauging either reasonable suspicion or probable cause and argued (at 16) that the facts of *that* case (which, of course, differ from the facts of this case) gave rise to reasonable suspicion even if they did not amount to probable cause.

[3] Petitioner appears (Pet. 15-16, 18) to have confused the holding of the court of appeals that the noncoercive encounter preceding his flight was not a *Terry* stop and required no justification at all (Pet.

specifically by a police question about drugs, manifestly had even greater significance than in the usual case of "flight at the approach of strangers or law officers" (*Peters* v. *New York*, 392 U.S. 40, 66 (1968)).[4]

In sum, the holding of the court of appeals correctly and unremarkably finds probable cause based on the particular facts of this case, giving appropriate weight to petitioner's flight at the moment he learned that the agents were looking for drugs. That holding presents no issue worthy of this Court's review.

2. Detective Cornille was the sole government witness at the pretrial suppression hearing. To the degree that Cornille observed Agent Lee's pursuit and apprehension of

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App. 23C) with a suggestion that his suspicious appearance and behavior would not have justified a *Terry* stop. The court of appeals, however, never suggested that petitioner's suspicious appearance and behavior did not give rise to reasonable suspicion, and it is quite plain from this Court's decisions that they did give rise to reasonable suspicion. See, *e.g.*, *Florida* v. *Rodriguez*, 469 U.S. 1 (1984) (per curiam); *Florida* v. *Royer*, 460 U.S. 491, 502 (1983) (plurality opinion). It follows that those factors, coupled with flight, ripened into probable cause. See *United States* v. *Sharpe*, 470 U.S. at 705-706 & n.2 (Brennan, J., dissenting).

[4] Although he made no such argument in the court of appeals (and therefore waived it), petitioner strenuously urges in his petition (at 9, 15, 16) that the trial court found that his flight was prompted by "knowledge of an impending search" (see Pet. App. 22G). Detective Cornille, however, testified that there was no mention of a search in the brief encounter with petitioner before petitioner fled (4/25/86 Tr. 29), and the trial court, which generally credited Detective Cornille's testimony and discredited petitioner's, never found that the DEA agents would have searched petitioner if he had not fled. The court's reference in its oral findings to "knowledge of an impending search" appears to be nothing more than an imprecise reference to petitioner's claimed *fear* of an impending search. In any event, what the agents would have done if petitioner had not fled is of no legal significance, and his rather dramatic flight from the agents is no less suggestive of criminal activity if it was prompted by a desire to avoid a search than if it was prompted by a desire to avoid questioning.

petitioner, he testified from personal knowledge. Cornille's testimony, however, also included information that Lee conveyed to him after the fact. For example, Cornille testified about Lee's observation of petitioner moving his hand toward his crotch area during the chase and then bending down toward the pickup truck. Cornille also testified that Lee had informed him that Lee had given petitioner his *Miranda* warnings. Petitioner contends (Pet. 19-21) that the district court improperly admitted this hearsay evidence at the suppression hearing.

The short answer to petitioner's claim is that this Court itself has approved the use of hearsay at suppression hearings. *United States* v. *Matlock,* 415 U.S. 164, 172-177 (1974). Indeed, Fed. R. Evid. 104(a) expressly provides in pertinent part that the judge at a preliminary proceeding "is not bound by the rules of evidence except those with respect to privileges."

In any event, Lee's out-of-court declarations were merely cumulative and did not affect the denial of petitioner's suppression motions. All of the facts justifying the pursuit and eventual arrest of petitioner—his suspicious behavior and dress, his false statement, and his flight—were personally observed by Detective Cornille.

Likewise, Lee's testimony was not required to defeat petitioner's *Miranda* claim. Cornille testified that he himself had given petitioner the *Miranda* warnings and that petitioner had waived them. This testimony clearly established—irrespective of Lee's repeating the warnings moments later—that petitioner's statement was admissible. In short, as the court of appeals held (Pet. App. 23C), Lee's hearsay statements were not needed to support the district court's rulings on petitioner's suppression motions.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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